Hudson Valley Electrical Construction & Maintenance, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 363, AFL–CIO. Cases 3–CA–21486 and 3–CA–21878

August 4, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On October 5, 1999, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Brian Monroe and *Albert Norek, Esqs.,* for the General Counsel.
Robert L. Adams, Esq., of Albany, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Albany, New York, on August 24, 1999. The original charge in Case 3–CA–21486 was filed by the International Brotherhood of Electrical Workers, Local Union No. 363, AFL–CIO (the Union) on August 26, 1998. An amended charge in this case was filed on March 26, 1999. The original charge in Case 3–CA–21878 was filed on April 12, 1999, and an amended charge was filed on May 19, 1999.[1] An order consolidating cases, amended consolidated complaint and notice of hearing was issued on May 21, 1999. The complaint alleges that Hudson Valley Electrical Construction & Maintenance, Inc. (Respondent) engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the building and construction industry as an electrical contractor. Its principal office and place of business is in Milton, New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

Respondent is a nonunion electrical contractor operating within the jurisdictional territory of the Union. It has been the subject of an organizing campaign headed by Union Organizer John Sager since 1992 or 1993. As a result of his efforts a representation petition was filed on November 5 and a Stipulated Election was held among Respondent's employees on December 2. The Union lost the election and filed objections to it. These objections were overruled by the Region. Respondent's chief officers are its Owner Mike Serini and its secretary/treasurer, Sharon Serini, Mike Serini's wife.[2] Respondent employs as its job superintendent, William McMorran, and in an unspecified supervisory position in its residential operation, Joseph Paladino. In August, Sager applied for employment as an electrician with Respondent. The primary issue in this proceeding is whether Respondent's refusal to consider him for employment violates the Act.

The complaint specifically alleges that Respondent violated Section 8(a)(1) of the Act by:

> 1. Superintendent William McMorran interrogating an employee about his union sympathies and membership at the Arlington High School jobsite in 1998, and
>
> 2. Owner Michael Serini and Joseph Paladino in September, 1998 informing an employee applicant that he would not be hired or considered for hire because of his union membership, and
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> 3. Since on or about October 15, 1998, establishing and maintaining a hiring application policy which includes, inter alia, the following provision:
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> "This application will remain on file for consideration for a period of forty five (45) days from date of receipt and will not be considered after that time."
>
> 4. Since on or about January 14, 1999, in writing, has directed John Sager, an employee-applicant, to direct his inquiries or contact with Respondent through Respondent's counsel.

It also alleges that Respondent violated Section 8(a)(3) of the Act by since on or about August 12, 1998, and since on or about March 18, 1999, refusing to hire and refusing to consider for hire employee-applicant John Sager.[3]

[1] In the absence of exceptions, we adopt, pro forma, the judge's recommended dismissal of the allegations that the Respondent violated Sec. 8(a)(1) of the Act by unlawfully interrogating an employee, and by establishing and maintaining an allegedly discriminatory hiring application policy.

In adopting the judge's dismissal of the 8(a)(3) allegation, we emphasize that, in sec. II,C, of his decision, the judge found that Sager was attempting to harass and embarrass the Respondent with his false report regarding alleged deficiencies in the Respondent's work at the New Paltz bus garage.

In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(3), Members Hurtgen and Brame do not rely on fn. 16 of the judge's decision.

[1] All dates are in 1998 unless otherwise indicated.

[2] Hereinafter the name Serini standing alone refers to Mike Serini. Sharon Serini will be referred to as S. Serini.

[3] The parties stipulated at hearing that Respondent has not hired any electricians, helpers, or apprentices from August 1, 1998, to date of hearing in this case.

B. John Sager's Activities With Respect to Respondent

John Sager has been an electrician since 1972 and has since 1992 been a full-time organizer for the Union. Inter alia, he has been attempting to organize the electricians at Respondent since 1993. Thus, his identity as a union organizer is and has been well known to Respondent. Beginning in June and continuing through the spring of 1999, Sager engaged in a series of activities involving Respondent. Respondent's response to many of these activities is either alleged to have violated the Act or formed the basis for Respondent's refusal to consider Sager for employment. They will be discussed below chronologically.

1. Incidents occurring in June through August

On June 16, Sager was at the Arlington High School jobsite, a job on which Respondent was the low bidder for electrical work. He testified that he went to the site to visit a union member, Frank Sylvester, who had been hired for the project by Respondent.[4] When he went on the site, he first encountered Respondent's owner, Michael Serini, and its superintendent, William McMorran. The three discussed Respondent's business and Sager learned that in addition to electrical construction, Respondent also had a division headed by Joe Paladino which performed residential electrical work. Sager stated that since Respondent's business was so good, it would be a good time to organize its employees. Serini countered by saying his employees were not interested in the Union. At this point in the conversation, Sylvester approached and patted Sager on the back. The conversation ended and Sager left the site.

Sylvester testified that the following day, McMorran was giving him a job assignment when McMorran asked him if he knew Sager. Sylvester said he did and that he had gone to school with Sager's sister. He testified that McMorran then asked him if he was in the Union. Sylvester testified that he told McMorran that he was, but was away for a while and came back. He added he needed a job and that is why he sought employment with Respondent.

On June 19, Sager returned to the site to meet with Sylvester. He first encountered McMorran who asked him to check in with him on any future visits to the site. McMorran noted he objected to Sager talking with employees when they were working. Sager stated he would not keep the employees from working. He then went to his car and wrote two duplicate letters addressed to Respondent, which stated:

> Please be advised that your employee Frank Sylvester, Jr., is a volunteer union organizer and is engaged in organizing activities protected by Section 7 of the National Labor Relations Act.

Sager then returned to the site and gave one copy of the letter to McMorran and stated he wanted to give the other letter to Sylvester. The two men then went to where Sylvester was working and gave him a copy of the letter. McMorran did not read the letter at that time so Sager told Sylvester and McMorran the contents of the letter. McMorran told Sager that it would be a couple of days before he would be able to give the letter to Serini. Sager stated that was okay so long as McMorran knew the letter's content.

Sylvester testified that after the meeting with McMorran and Sager, he asked McMorran why he had inquired about Sylvester's union membership the day before. According to Sylvester, McMorran said he wanted to know and was just doing his job. Sylvester said that maybe the Company should go union as there was a lot that was good about the Union. He then asked what McMorran thought about unions. McMorran replied that he has his own opinion about unions and that opinion was known by Sager.

McMorran admitted having a conversation with Sylvester about Sylvester's union membership. He testified that they were talking about softball leagues and Sylvester said he had played on a team in Newburgh, New York. McMorran asked if he worked for a union contractor when he was in Newburgh as McMorran was familiar with a number of such contractors in that area. McMorran remembers Sylvester saying he had worked for a union contractor. McMorran denied that he was under any instruction to investigate the union sympathies or membership of employees. McMorran and Sylvester had conversations on a daily basis, partly related to work and partly on other subjects.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by McMorran asking Sylvester about his union membership. Though the General Counsel on brief does not assert that this conversation was unlawful, it did not withdraw the complaint allegation. In any event, I do not find it to be so. I accept McMorran's version of the conversation. Sylvester either lied in his direct testimony or his affidavit to the Board over whether or not he was a "salt." Thus, I find McMorran more credible. Under McMorran's version of the conversation, the subject came up harmlessly as part of a social conversation. There were no pending Petition for Representation and no contemporaneous unfair labor practices being committed by Respondent. There is no showing that Respondent was engaging in a pattern of surveillance or interrogation of employees to discover their union sympathies. Considering all the circumstances, I find that McMorran did not violate the Act.

On June 26, Sager went to a company called Plasmaco, where an addition to the existing plant was to be constructed. Though the job initially was going to be let for bid only to union contractors, Plasmaco had allowed Respondent to bid and it was the low bidder on the contract for electrical work. On this June date, he asked why Respondent had been allowed to bid and was told it was the decision of the head of the company. Sager then told the Plasmaco officials that he had a problem with Respondent. Sager was assured that the contract had not been awarded as of that date and Sager was urged to hold off on picketing the project. At some point shortly after this meeting, Respondent was awarded the electrical work on the involved project.

[4] Frank Sylvester is a journeyman electrician and a member of the Union. He was hired by Respondent on June 12 after getting an application form from Sharon Serini. She directed him to the Arlington High School job. He did not disclose nor did S. Serini inquire about his union membership. His last day of employment was on August 30. He only worked at the Arlington High School jobsite during his period of employment. He testified that he did not seek employment with Respondent as a "salt" and that he only applied because he needed work. However, his affidavit to the Board states that he applied as a "salt" at the request of the Union's assistant business manager. Sylvester was hired for a specific job and was terminated when the job ended. Several other employees were similarly hired and then terminated at the completion of the job.

On August 19, Sager returned to Plasmaco in the company of the Union's assistant business manager, Sam Fratto. Fratto had decided to try to organize the construction workers on the job site. Fratto and Sager engaged in handbilling employees coming and going to the site and placing the handbills on the employees' automobiles. They also had a bullhorn and walked back and forth in front of the plant reading the contents of the handbill. They engaged in this activity for about 2-1/2 to 3 hours. They repeated this activity for about the same length of time the next 2 days. Sager was aware at this point that Respondent had been awarded the electrical contract for the job and was working on the site. He received some complaints and negative comments from workers on the job about the bullhorn, which apparently was very loud.[5] Although in her testimony S. Serini did not identify this incident as playing a part in her decision not to consider Sager for employment with the Respondent, such could be inferred from the fact that her counsel asked her about the incident. It is clear that Sager's actions with respect to the Plasmaco job were protected union activities. Both seeking to have the job given to a union contractor and picketing in support of an organizing effort at the job are obvious legitimate union activities.

On August 11 Sager came across an ad in a local newspaper reading: "ELECTRICIAN, Wanted. Minimum 10 years experience required."[6] It also included a phone number, which Sager recognized as that of Respondent.[7] The following day, he went to Respondent's facility and secured an employment application form, filled it out attaching his resume and left if with the Company's receptionist. Two days later, he called and talked with the receptionist who told him that the Company's owner or his wife Sharon would call him. He never received a response from either of them with regard to this application.

The application form he completed asks for the four previous employers of the applicant. Sager named one for 1998 and another for 1997. He noted that he had been fired from both jobs for engaging in union activity. In his testimony, he added that he was fired from both jobs after about 8 or 9 days of employment. He then referred the reader of the application to his resume. It states that from 1992 to present Sager had been a union organizer.[8] It also states that from 1990 to 1992, he had been a foreman at a company; from 1990 to 1991, he had been a part-time maintenance electrician for a trucking company; from 1987 to 1990, he had been a superintendent for an electrical company; and from 1976 to 1987, he had been a journeyman electrician for another electrical company.[9]

On the *same* date he filed his job application with Respondent, August 12, Sager went to the New Paltz bus garage, a jobsite on which Respondent was performing electrical work. His ostensible purpose in going to the site was to see some of Respondent's employees who had allegedly signed authorization cards for the Union. When he arrived he did not see any of Respondent's employees at the site. He went to the electrical room where Respondent was performing electrical construction. No one was there and he took it upon himself to perform an inspection of the work that had been done. According to Sager, he found and noted several deficiencies in the work he observed, though a sticker at the site indicated the work had been officially inspected only a day or two before. He took the list of alleged deficiencies to the job's project manager, informing him that the deficiencies were serious electrical code violations and had somehow mistakenly passed inspection. He then called Serini and got his voice mail. Sager left a message that he had found and reported serious code violations on the project. Later that day, he encountered Serini, who refused to speak to him. According to Sager, he reported the problem to Serini because it was a dangerous situation that could cause an electrocution if power was turned on. That night, he called the New York Board of Fire Underwriters, an agency charged with official electrical inspections and the agency which had inspected the work Sager alleged to be deficient. He spoke with Bill Ryan, the chief electrical inspector and informed him of the alleged code violations. He also noted that the work he found deficient had been approved by one of the agency's inspectors.

With regard to this incident, Serini testified that he was called on August 13 by the project manager, who told him that Sager was on site with a list of alleged code violations with respect to Respondent's work. He stated that he was going to call the owner of the project and the New York Board of Fire Underwriters to report that Respondent's work was not proper nor was the inspection of the work. The project manager was upset that Sager had come on site and inspected work that was the province of the Underwriter's inspector. Serini was required to contact the Underwriters and meet with the original inspector, Edward Wrobleski and his boss, William Ryan, and reinspect the involved work. No code violations were found and no corrective work was required.

Wrobleski is an electrical inspector for the New York Board of Fire Underwriters and was responsible for inspecting the New Paltz bus garage job. He testified that 2 days after he had inspected Respondent's work on the project, he received a call from his boss, William Ryan, who informed him that Sager had reported that work he had approved was not up to code.[10] Wrobleski asked Ryan to accompany him to the job and reinspect the work. They went to the job and found all the work by Respondent to meet code, including the work that Sager alleged to be in violation of code. The inspection performed by Wrobleski and criticized by Sager was an interim inspection of work in progress and authorized power to be turned on to the work completed. Ryan contacted Sager and told him that noth-

[5] S. Serini testified that the Plasmaco project manager asked her what Respondent was going to do about the picketing. She told him there was nothing she could do about it.

[6] S. Serini testified that she occasionally places employment advertisements to see what the current labor market is like. It bids on jobs regularly and if successful, may have a need to hire additional electricians. It if is not successful in bidding, it would have no need to hire. Such was evidently the case in the placing of the advertisement to which Sager responded. No one was hired as a result of the ad.

[7] Sager routinely makes job applications in response to employment ads for nonunion employers, when he can determine the identity of the company placing the ad. At the time he applied with Respondent, he had about 20 to 30 job applications outstanding.

[8] Sager is a full-time employee of the Union and is paid at the journeyman's hourly rate of $29 an hour plus $15 an hour in benefits.

[9] With regard to Sager's application, S. Serini testified that she considered his employment history "jumpy," noting that Sager, insofar as his employment as an electrician is concerned, frequently changed employers. She testified that when hiring she looks for an electrician who plans on working for the Company for a long time. Most of the Company's employees have been with it for more than 5 years. She, however, did not identify this "jumpy" employment history as the reason why Sager was not hired or considered for hire.

[10] Wrobleski received a similar call from Serini who told him that the owner of the project had reported Sager's allegations to him.

ing was wrong on the project. On brief, the General Counsel asserts that Wrobleski and Mike Serini agreed with Sager's factual findings with respect to Respondent's work, but not the conclusions. I have reread the transcript a number of times and I cannot find that either witness agreed with any of Sager's findings except possibly his finding of "insulation torn on conductors" and even that is questionable.

On September 1, Sager went to Respondent's office and picketed. Using a bullhorn, he notified all that could hear that Respondent had been charged with unfair labor practices by the Union. Respondent's office is the only business on an otherwise residential street. Sager testified that he engaged in this activity for about 15 minutes before police arrived and he left. Sager's daily log indicated that he engaged in his protest from 9:30 until 10 a.m., when a police officer arrived and told him the bullhorn violated the town's decibel level code. Sager asked the officer to check this information, as he had never heard of such a law. About 10 minutes later, another officer arrived and informed Sager he was disturbing the peace. He added that Sager could picket but not use the bullhorn or speak in a loud voice. S. Serini indicated that this activity was one reason why she would not consider Sager for employment. I find that this picketing activity was legitimate union activity, a protest of Respondent's not hiring Sager. The use of the bullhorn did not strip the activity of its protection under the Act. Had Sager not ceased the use of the bullhorn after being instructed by the police, then it might be questionable. However, he did refrain from its use after being instructed to stop. On brief, the General Counsel suggests it was an independent violation of the Act for S. Serini to call the police on this occasion. I do not agree. S. Serini credibly testified that Respondent's office is in a residential neighborhood and is the only business on the street in front of the office. She testified that she called the police because of Sager's yelling and use of the bullhorn. I believe and find that she was well within her rights to call the police as Sager admitted that the police informed him he was violating the town's sound code by yelling and using the bullhorn. Certainly, S. Serini has a right to report a violation of the law.

On September 5, Sager returned to the Arlington High School jobsite and encountered Serini, who would not speak with him. After about half an hour, Sager approached Serini and asked him why he was mad at him. According to Sager, Serini replied: "You're causing a lot of problems. You're coming to my job sites. You've been talking to my people. You came and put in an application over at my office. I'm just not happy."

Sager replied and Serini calmed. He told Sager he had given his job application to the residential division manager, Joe Paladino. He added that since Paladino knew Sager, he would never hire him. Sager then left.

Serini did not deny having a conversation with Sager on this date, but did deny discussing his job application and telling him that Paladino would never hire him. I do not know who was telling the truth about the matter of the job application coming up in this conversation. I will credit Sager as he had an apparently clear memory of the conversation whereas Serini did not. The complaint alleges that Serini's comments to Sager on this occasion violated Section 8(a)(1) of the Act. I do not agree. I will, hereinafter, find that Respondent had a legitimate business reason for not considering Sager for employment unrelated to his union protected activities. Thus, Serini was justified in telling Sager that he would never be hired by Respondent.

On or about this day in September, Sager took photographs of employees working at the Arlington High School job. According to Sager he did so because Frank Sylvester had been laid off ostensibly because the job was complete. The Union filed, then withdrew, a charge with the Board over this layoff. He withdrew the charge when a review of the photos revealed that the photographed employees were employees of Respondent who had been transferred to the Arlington High School job from other jobs. S. Serini identified this activity as being a reason she would not consider Sager for employment. She testified that a number of employees had complained to her about this activity, noting they did not want their pictures taken by Sager. She testified that she and Sager spoke about the matter and he agreed that he would return the pictures to the employees he photographed. He continued to take pictures but reneged on the promise to return them. S. Serini added that the High School also asked Sager to stop taking pictures. I find that the activity was protected at its outset at least. The record is not developed enough on this point to determine whether the manner in which Sager took pictures stripped his otherwise protected union activity from its protection. No employees were called to testify about the picture taking and no one from the school testified. Based on the evidence adduced, I cannot find that Sager's actions were so gross as to make the otherwise protected activity unprotected.

Sager testified that on September 15, he went to a jobsite where Respondent was starting work and had a conversation with Joseph Paladino. He asked Paladino to consider using union labor on the job. According to Sager, Paladino said he was not interested and mentioned Sager's job application, saying: "I received from Mike Serini your application and resume. He says you're just 'busting balls.' I'm not even going to consider hiring you." Sager indicated his disappointment. According to Sager, Paladino again said he did not want anything to do with the Union and left.

Paladino denied having any conversation with Sager about Sager's job application. He does remember having a conversation with him at about the time Sager indicated that they met. They discussed business in general and the project on which Paladino was working. Sager was on the site to see if it qualified as a prevailing rate job. Paladino testified that the matter of Sager's seeking employment with Respondent did not come up. Paladino did tell Sager he was "busting balls," but in the context of detaining him to talk for 45 minutes. Paladino denied ever telling Sager he would not consider hiring him. Paladino was unaware at the time of this conversation that Sager had filed a job application with Respondent. As was the case with regard to the similar conversation discussed above between Sager and Serini, I am not certain which version of the Sager—Paladino conversation is the more accurate. However, as with case with the first conversation, Sager's memory of the conversation seemed far better than Paladino's. Thus, I credit Sager's version. However, for the same reason I found that the earlier conversation did not violate the act, I find this one likewise did not constitute a violation.

On January 14, 1999, Sager received from his attorney a letter from Respondent's attorney. The letter instructed Sager that all communication between Sager and Respondent must be through Respondent's attorney. Respondent did not hinder Sager's visits to its jobsites or its employees however. Sager also spoke directly with Serini and other company officials after this letter. S. Serini testified that she and her husband

made the request of their attorney to notify Sager that all communications were to be through their attorney. They did so out of fear that they might say or do something that would cause Sager to file additional charges against them. The complaint alleges Respondent violated the Act by imposing this requirement on Sager. I do not agree. The requirement does not infringe on any legitimate union activity which Sager might want to engage with respect to Respondent. It did not bar him from going on Respondent's jobsites, or in any other fashion hinder his communication with Respondent's employees. It actually did not stop him from continuing to directly communicating with Respondent's management. As Sager did not represent Respondent's employees, I do not believe M. or S. Serini had any legal obligation to communicate directly with Sager.

On March 17, 1999, Sager came across another newspaper ad placed by Respondent, this one seeking a residential electrician. He called Respondent and spoke with an employee named Sue, who, according to Sager, confirmed that Respondent needed electricians.[11] Sager then faxed his resume to Respondent. He later called and again spoke with Sue, who told him he did not have to send in a new application.

On April 5, 1999, Sager received a letter from Respondent's attorney with a blank job application form enclosed. The letter stated that Sager could submit a new job application through the attorney's office. On this application form Sager noted for the first time that printed on the form was a notice that applications remain on file for 45 days and will not be considered thereafter. On April 8, 1999, Sager sent the completed application form to Respondent's attorney. On April 15, 1999, Sager received a letter from Respondent's attorney asking for the name and phone number of people to contact for job references. Sager responded with a letter dated April 21, 1999, listing three persons to contact.[12] Sager did not hear again from Respondent until July 2, 1999.[13] By letter of that date from Respondent's counsel, Sager was offered employment with the sole stated purpose of cutting off any potential backpay liability. By letter dated July 20, 1999, Sager responded declining the offer because of physical problems and stating he would notify the Company when he was physically able to work again.

S. Serini testified that the 45-day cutoff rule was adopted because the Company wanted to clean its files. She asked some other local contractors about their policy and checked with counsel before adopting the rule. She testified that the rule had nothing to do with Sager's application. I credit her assertion in this regard. The complaint alleges that the imposition of this requirement is unlawful. In the cases cited by the General Counsel, restrictions placed on hiring practices had little legitimate justification and made the filing of applications by union applicants more onerous. On the other hand, in a labor market with as much flux as the electrical contracting market, it makes good sense to have only current job applications on file. Moreover, the requirement is no more onerous for a union applicant than for a nonunion applicant. It does nothing but require any applicant to keep a current application on file every 45 days. I do not find that the imposition of the time requirement was discriminatorily motivated, has a discriminatory effect, or is unlawful.

C. Did Respondent Unlawfully Discriminate Against Sager?

It is well established under the *Wright Line*[14] test that the burden lies with the General Counsel to establish a prima facie case that an alleged discriminatee's protected activity was a motivating factor in a respondent's decision to, as in this case, refuse to consider for employment.[15] If the General Counsel establishes such a case, then the burden shifts to the respondent to rebut it. To do so the respondent must establish by a preponderance of the evidence that the same action would have taken place in the absence of the discriminatee's protected conduct. In evaluating the General Counsel's prima facie case that the discriminatee's protected activity is a motivating factor in the decision not to hire, the Board examines whether the employer had knowledge of the activity in question, the timing of the Respondent's action in relation to acquisition of such knowledge, and whether the respondent has expressed any animus toward the discriminatee's protected conduct.

The General Counsel has made a prima facie case of discrimination. S. Serini, the person in charge of hiring gave a number of reasons why she would not consider Sager for employment with Respondent. These reasons included his picketing of the Respondent's office, taking photographs of Respondent's employees, and inferentially, his picketing at Plasmaco. I have found each of these activities to be protected union activities and thus by her own admission, the decision not to consider Sager for employment was motivated in part because of such activities. The more serious question remains as to whether Sager's conduct with respect to the New Paltz bus garage affords Respondent a legitimate reason for refusing to hire him or consider him for employment.

S. Serini is in charge of all hiring for Respondent. S. Serini identified as the primary reason for not considering Sager for employment his conduct at the New Paltz bus garage.[16] Both Mike Serini and S. Serini seemed genuinely upset about this incident and I credit her testimony that it was the primary reason for not hiring or considering for hire John Sager. I credit the testimony of Mike Serini, Sharon Serini, and Edward Wrobleski over that of Sager with respect to New Paltz bus

[11] "Sue" was evidently incorrect, as Respondent did not hire anyone after filing this ad.

[12] S. Serini introduced documents that show that from January 1, 1998, through May 1999, the Company had some 28 job applicants that did not get hired. Some were union members, but most were not. No employees were hired after August 1, 1998. If work were available when a job applicant applied, she would check the application and if met her approval, she would interview them and if that went okay, she would hire them on the spot if they were needed immediately. She would thereafter check references when she had the time. If an applicant was not needed immediately, she would check references before sending them to a job. S. Serini testified that after receiving the reference material from Sager, she attempted to call the individuals named as references by Sager. She could not reach the first two after substantial effort and the third could not give a reference.

[13] Although it is immaterial in light of my ultimate decision in this case, Sager has been unable to perform as an electrician since June 1999, because of a physical problem.

[14] 251 NLRB 1083 (1980).

[15] I would not be correct to find that Respondent unlawfully did not hire Sager as it has not hired anyone since a point in time before he filed an application.

[16] S. Serini had other reasons for her reluctance to hire Sager. Most of them stemmed from activity engaged in by Sager which was either clearly protected or arguably protected. The second reason was that a number of Respondent's existing employees had told her that they would not work with Sager. This reason is clear hearsay and without corroboration from the involved employees would not effectively rebut the General Counsel's case

garage incident. I, therefore, find that Sager's report of deficiencies in the work of Respondent on the project was untrue. I find that the action taken by Sager of "inspecting" the work of Respondent not to be concerted as he acted entirely on his own and clearly for his own reasons. I do not find that it was related to any legitimate union interest and thus was not union activity. I find that if by some stretch of the imagination this activity could be legitimately called union activity, it lost the protection of the act when Sager reported false findings of code violations. I believe and find that Sager was attempting to harass and embarrass Respondent with his false report. Such activity is not protected and gave the Respondent a legitimate business reason, wholly unrelated to Sager's union membership, for not hiring or considering him for employment. Because of his actions with respect to the New Paltz job, I seriously question whether Sager really wanted employment with Respondent. It seems to me that any employer, Respondent included, would refuse to hire or consider for hire, any applicant, prounion or antiunion, who simultaneously with the filing of an application, would falsely accuse the potential employer of shoddy work. I find that Sager by his actions gave Respondent a totally legitimate reason for not considering him for employment, a reason wholly unrelated to his status as an organizer and his protected union activities. I find that Respondent has met its burden of persuasion and has effectively rebutted the General Counsel's prima facie case. Therefore, I find that Respondent did not violate the Act by refusing to hire Sager or consider him for employment.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not commit the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The complaint is dismissed.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.